Supreme Court, U.S.
FILED
APR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

U.S.S.C. No.

87-24

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

LAWRENCE MOORE and WALTER F. WHELAN, JR.

Petitioners,

v.

BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

ON ORDER OF THE NINTH UNITED STATES CIRCUIT COURT OF APPEALS

George L. de la Flor
PHIN & DE LA FLOR
835 Fifth Avenue
Suite 309
San Diego, CA 92101
(619) 696-9655
Attorney for Plaintiff-Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appellate Court erred in dismissing the appeal below on the basis that Plaintiffs failed to serve their complaint within the six months statute of limitations found in §10(b) of the National Labor Relations Act 29 U.S.C. §160(b), thus failing to consider the substantive merits of the appeal.

PARTIES TO THE PROCEEDING IN WHOSE COURT THE JUDGMENT IS SOUGHT TO BE REVIEWED

All names are contained in the caption to this case.

TABLE OF CONTENTS

Questions Presented for Review. i

Parties. i

Table of Contents. ii

Table of Authorities 1

Citations. 2

Jurisdictional Statement 2

Statutes Involved. 2

Statement of the Case. 4

Summary of Argument. 7

Argument 8

Conclusion 10

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. §1291, 1331 7

29 U.S.C. §160(b) . . . . . 7 & 9

Federal Rules of Appellate Procedure 4(a) 7

Supreme Court Rule 17 7

CASES

Del Costello v. International Brotherhood of Teamsters
463 U.S. 157 (1983) 11

Gallon v. Levin Metals Corp.
779 F. 2D 1439 (9th Cir. 1986)
Cert. filed
54 U.S. Law Week 3762 . . .10 & 11

West v. Conrail
780 F. 2d 361 (3d Cir. 1985)
Cert. Granted 54 U.S.
Law Week 3859 U.S.S.C.
Doc. 85-1804
Reversed 55 U.S.L.W. 4466. 12 & 13

CITATIONS

Opinion of the United States Court of Appeals for the Ninth Circuit attached as Exhibit A of the Appendix. The judgment of the United States District Court for the Southern District of California attached as Exhibit B of the Appendix.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. §185, 28 U.S.C. §1331, 28 U.S.C. §1291, Federal Rule of Appellate Procedure 4(a) and Rule 17 of the Rules of this Court.

STATUTES INVOLVED IN THIS CASE

Section 10 of the National Labor Relations Act, 29 U.S.C. §160(b):

> Whenever it is charged that any person has engaged in or is in engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of the copy thereof upon the person against whom such charges may, unless the person aggrieved thereby was prevented from filing such charges by reason of service in the Armed Forces, in which event the six month period shall be computed from the day of his discharge. Any complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as applicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to §2072 of Title 28, United States Code.

§301 OF THE LABOR MANAGEMENT RELATIONS ACT,
29 U.S.C. §185 301(A)

Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such orginizations, may be brought into any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

On November 10, 1983, Plaintiffs filed a complaint alleging breach of contract by Defendant BECHTEL POWER CORPORATION ("BECHTEL") and breach of the duty of fair representation by Defendants INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN (collectively referred to as "UNION"). An amended complaint was filed on April 9, 1984 and served on April 24, 1984.

On May 11, 1984, Defendants LOCAL 569, BLACKWOOD and LOVIN filed their answer to the amended complaint. Defendant BECHTEL filed its answer on June 15, 1984.

On September 19, 1986, the United States District Court for the Southern District of California entered an order granting motions for summary judgment brought by all the Defendants. (Appendix, Exhibit A)

Plaintiffs filed a timely notice of appeal with the Ninth United States Circuit Court on October 10, 1985. On March 19, 1985, Appellants moved for a stay of the appeal proceedings and for

an extension of time to file the Opening Brief. Those motions were brought in light of the recent Ninth Circuit case of Gallon v. Levin Metals Corp., 779 F. 2d 1439 (9th Cir. 1986), cert. filed 54 U.S.L.W. 3763, which decision would have required dismissal of the appeal. Appellants sought the stay in the hope that Gallon, supra, would ultimately be reviewed by this Court. On March 28, 1986, a sixty day stay was granted.

Briefs were ultimately filed regarding the substantive issues on appeal, but the Circuit Court denied the appeal on January 7, 1987 based on Gallon v. Levin Metals, Supra. Petitioners herein seek review of this order by timely filing of this petition.

SUMMARY OF ARGUMENT

Petitioner contends that §10(b) of the National Labor Relations Act, as applied by the case of Delcostello v. International Brotherhood of Teamsters, 463 US 151 (1983), is applicable to actions arising under §301 of the Labor Management Relations Act only insofar as it provides a statute of limitations for filing a complaint. Since it is a borrowed statute of limitations, rules regarding service of a complaint shall be governed by Federal Rule of Civil Procedure 4(a) and (j). This argument was recently adopted by this Court in West v. Conrail 780 F. 2d 361 (3d Cir. 1985), Cert. Granted 54 U.S.L.W. 3859, Reversed 55 U.S.L.W. 4466 (April 6, 1987) U.S.S.C. Doc. 85-1804. Petitioners pray that this case be considered and summarily reversed

accordingly.

ARGUMENT

The sole issue raised by this petition has already been decided in West v. Conrail, supra. Petitioners first attempted to timely file this petition on April 7, 1987. West v. Conrail, supra was decided by the Court on April 6, 1987.

Petitioners had wished to be considered within the class of cases to be affected by this Court's ruling in West, supra. Unbeknownst at time of filing, the issue was already decided. Petitioners must have this Petition accepted in order to preserve their rights.

The arguments in support of overturning this decision need not be argued here. They have already been accepted by the Court. Peititioners did not

obtain a ruling on the merits of their appeal in the Ninth Circuit based on that Court's reliance on a case improperly decided. They could not seek rehearing since there were no new issues of law to be raised a that time. At this time however, there is new law, or at lease a clarification of old law that had been misinterpreted by the Appellate Court. This Court can provide Petitioners their only remedy. They therefore pray that this petition be accepted and that the case be reversed and remanded to the Ninth Circuit.

CONCLUSION

Petitioners pray that this Court consider this petition, review the Order of the Ninth Circuit, reverse said Order and remand the case back to that Court for a ruling on the merits.

DATED: 5-18-87

George L. de la Flor

SUPREME COURT AFFADAVIT OF SERVICE

I, George L. de la Flor declare:

1. I am a member of the bar of this Court;

2. On May 22, 1987 I placed A PETITION FOR WRIT OF CERTIORARI and APPENDIX, in the matter of MOORE, et al. v. BECHTEL POWER CORPORATION, et al. in shipping containers addressed as follows:

DONALD A. NEWMAN, ESQ.
THELEN, MARIN, JOHNSON & BRIDGES
333 S. Grand, 34th Flr.
Los Angeles, CA 90034

ELLEN GREENSTONE, ESQ.
LEVY, GOLDMAN, GREENSTONE & HUBEL
611 S. Shatto Place
Los Angeles, cA 90026

CLERK
UNITED STATES SUPREME COURT
Washington, D.C., 29543

and deposited them in the United States Mail at San Diego, California, with first class postage fully prepaid thereon.

I declare under penalty of perjury that the foregoing is true and correct and that it is executed this 21st day of May 1987, in San Diego, California.